United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

BRIEF FOR APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21734

363

CORNELIUS H. DOHERTY, SR., EXECUTOR
Appellant

v.

VIRGINIA FAIRALL, LORENE FAIRALL WILMOT,
and ELIZABETH FAIRALL VINTON
Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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QUESTION PRESENTED

Are carbon copies of prior wills in the files of the attorney for the testatrix, the originals of which were destroyed by the testatrix, privileged communications not subject to pre-trial discovery in a suit attacking the validity of a subsequent and last will?

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BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal by Cornelius H. Doherty, Sr., co-executor of the Estate of Elizabeth Fairall, and Cornelius H. Doherty, Sr. in his personal and individual capacity as attorney for the decedent, Elizabeth Fairall, from a judgment and order of the United States District Court for the District of Columbia adjudicating him in contempt of Court for failing to obey the orders of the Court entered on May 17, 1967, and October 27, 1967.

Jurisdiction was conferred on the District Court by the provisions of Section 306, Title 11 of the District of Columbia Code, 1961 Edition, and on this Court by Section 1291, Title 28, United States Code.

STATEMENT OF THE CASE

On September 20, 1965, and for over twenty years prior thereto, Cornelius H. Doherty, Sr. represented Elizabeth Fairall, hereinafter referred to as the testatrix, as her attorney. During the course of that professional relationship, Cornelius H. Doherty, Sr. prepared, at the request of the testatrix, six wills. Upon the execution of each will the original of the prior will was destroyed by the testatrix, and each will contained a clause revoking any and all prior wills.

On September 20, 1965, the testatrix executed her last will and testament, appointing Cornelius H. Doherty, Sr. and Cornelius H. Doherty, Jr., or the survivor of them, as executors. There were no further testamentary instruments executed by her prior to her death.

Following the death of the decedent on April 25, 1966, the Executors duly filed this will dated September 20, 1965, and it was subsequently fully proved and admitted to probate. All the heirs at law, next of kin and legatees, including Virginia Fairall, Lorene Fairall Wilmot and Elizabeth Fairall Vinton, hereinafter referred to as the nieces, having consented.

On May 6, 1966, letters testamentary were granted to Cornelius H. Doherty, Sr. and Cornelius H. Doherty, Jr.

On November 2, 1966, the nieces filed a complaint contesting the validity of the will dated September 20, 1965, on the grounds that the will was not properly executed; that the decedent was not of sound mind and that her execution was procured by undue influence, duress and coercion. In addition the nieces revoked their consents to the probate of the will dated September 20, 1965, which had been executed by them on May 2, 1966.

On December 15, 1966, counsel for the nieces sent to Cornelius H. Doherty, Sr., Executor, hereinafter referred to as executor, interrogatories inquiring about the existence of wills that had been executed by the testatrix prior to September 20, 1965. Following a hearing by the pre-trial examiner and modification of the interrogatories by her, the executor filed his answers, which were signed by him in an individual capacity, stating that he had executed file carbon copies of wills dated December 5, 1941, August 16, 1944, January 17, 1951, the originals of which had been destroyed, and also unexecuted carbon copies dated January 9, 1953, March 8, 1957, and September 20, 1965.

Pursuant to a motion to produce filed by the nieces, the Court, on May 17, 1967, ordered Cornelius H. Doherty, Sr., Executor, to make available to counsel for the nieces, for inspection, copies of these documents. Thereafter, the nieces filed a motion to remove the executors and for other relief because of the refusal of the executor to produce any documents referred to in the Court's order of May 17, 1967, for inspection by counsel for the nieces. This motion was subsequently denied after hearing by several judges. Although denying the relief sought, the Court on October 27, 1967, reaffirmed the prior order of May 17, 1967.

On October 26, 1967, the nieces filed a motion to adjudicate Cornelius H. Doherty, Sr., executor, in contempt for refusal to make discovery. This motion came on for hearing and on January 5, 1968, the Court entered an order adjudicating Cornelius H. Doherty, Sr., as executor and individually, in contempt for failing to obey its previous orders.

STATEMENT OF POINTS

1. The Court erred in ordering Cornelius H. Doherty, Sr., executor and individually, to make available to counsel for appellees for inspection copies of former wills of the decedent.

2. The Court erred in adjudicating Cornelius H. Doherty, Sr., executor and individually, in contempt of Court for

failing to obey the Court's prior orders to make copies of former wills of the decedent available to counsel for the appellees for inspection.

SUMMARY OF ARGUMENT

Information learned by an attorney as a result of his professional relationship with a client is privileged and confidential. Upon the death of the client and in the proceeding attacking the capacity of the client to properly execute a will, the attorney cannot be compelled to disclose the contents of former wills executed many years prior to the execution of the will under attack without violating the confidence bestowed upon him by his client.

ARGUMENT

At the outset it must be stated that Cornelius H. Doherty, Sr. is, and has been, a member of the bar of this Court and of the District of Columbia for over forty-three years; that during that time he has been actively engaged in the practice of law before this Court and the United States District Court; that during those years as now, he holds the Court in highest esteem and respect. It is with much regret, not for the consequences that may have befallen him, but because of his respect for the Court and the law, that he most reluctantly and respectfully has taken the position which he has in this conflict between his duty to the Court and as a member of the bar and his duty to his client. There is no desire on his part to flaunt the orders of the Court nor is he motivated by any desire to cast himself in any roll nor to receive publicity. The issue herein is simply and solely a legal one. The path chosen was selected solely on the grounds that it was the correct one, although not the popular one. It was chosen, not out of disrespect for the Court or the law but rather from a conviction that the law and his profession required it.

On May 17, 1967, the District Court entered an order permitting counsel for the nieces to inspect and/or copy

certain executed file carbon copies of former wills and unexecuted original or copies of proposed wills of the testatrix. Thereafter, counsel for the nieces and the Court were advised that Cornelius H. Doherty, Sr., executor, could not comply with this order for that, as executor he did not have these documents. However, he stated that he did have these documents in his custody and control in his individual capacity as an attorney but that they contained information about the affairs of the testatrix which he learned from her during her lifetime by and through his professional relationship with her as her attorney. Since the information was learned as a result of the attorney client relationship it was therefore privileged and he, as the attorney, was bound not to divulge it.

Upon inquiry by the Court on January 5, 1968, it was stipulated that if the order to produce were directed to Cornelius H. Doherty in his individual capacity as a witness and as attorney for the testatrix, since he held these documents in his individual capacity and not as an executor, that his position would be the same in that he could not comply with any order of the Court because the information sought from him was learned as a result of his professional relationship with the testatrix.

There is no question that the attorney client privilege exists in the District of Columbia. This privilege was clearly established by this Court in the case of *Elliott v. United States,* 23 App. D.C. 456 (1904).

Nor can it be seriously questioned that prior wills of themselves represented communications between the attorney and client. The Supreme Court of Errors of Connecticut in *Doyle v. Reeves,* 112 Conn. 521, 152 Atl. 882 (1931), stated that of necessity a will is ". . .the result of information given and desires expressed by the client and advice afforded and professional skill exercised by the attorney. . .", and, therefore, they are communications between the client and counsel (152 Atl. at page 883).

Since the privilege exists and includes wills and drafts of wills the question then arises have the Courts developed any exceptions to this privilege insofar as copies of former wills are concerned.

In *Glover v. Patten*, 165 U.S. 394, 17 S.Ct. 416, 41 L.Ed. 760 (1897), which was an appeal from the Court of Appeals of the District of Columbia, the Supreme Court stated what has been generally accepted thereafter as the majority rule: ". . .that, in a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will or other similar documents, are not privileged. While such communication might be privileged, if offered by third persons, to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin. . ." (165 U.S. at page 406).

The primary reason for this exception to the attorney-client privilege is manifestly for the benefit of the testator himself, for in a contest between those who claim under him it is his intentions which are being sought to be determined in order to attain the proper fulfillment of his will. It is necessary, however, to keep in mind the type of proceedings the Supreme Court was referring to when it provided for an exception to the attorney client privilege. In the Glover case, the Court was concerned with intepreting a will. It was not a proceeding to contest the validity of that will. All the parties agreed that the document was, in fact, the decedent's last will and testament. The issue arose regarding the interpretation of certain paragraphs of the will. The exception to the privilege has never been extended to include communications of a decedent other than with respect to the particular instrument which is sought to be proved or interpreted.

The Supreme Court certainly did not mean that by the very execution of a testamentary instrument the testator thereafter waived the attorney-client privilege and that resort could be had to every communication to the attorney and

to documents prepared by the attorney for the client years before the existence of the will in dispute. The exception to the privilege was invoked to enable attorneys to explain an instrument and to aid in determining the true intentions of the testator as expressed in that instrument or to enable the attorney to testify with respect to the capacity of the testator to execute that particular instrument.

The waiver was not invoked to enable a dissatisfied heir or legatee to rummage and fish for evidence for the sole purpose of destroying that instrument and of destroying the intent of the testator as expressed in that instrument. It certainly seems that while a testator may be said to waive the privilege of confidence in order that his true intentions as stated in a will might be ascertained, most certainly by subsequently revoking and destroying that will it is a clear and unequivocal manifestation that he did not want the contents of that former will disclosed to anyone. Therefore, whatever waiver or exception to the privilege that the law may have engrafted in order to enable the attorney to testify and aid in determining the testator's true intent, the testator clearly by his actions in subsequently destroying an instrument may annul that waiver or exception. *Lennox v. Anderson, et al,* 140 Neb. 748, 1 N.W. (2d) 912 (1942).

The testatrix in this case never married and was without any close family. The nieces were her sole next of kin. Cornelius H. Doherty, Sr. has offered to disclose, by way of affidavit, that portion of the prior wills of the testatrix that made reference to the nieces. (JA 41) Certainly any further disclosure would not aid in determining the capacity of the testatrix to properly execute the will of September 20, 1965. Further disclosure would only result in discrediting the memory of the testatrix in the minds of persons who found themselves not included in prior wills or left out of subsequent wills or if included the extent of their participation increased or lessened. Disclosure certainly would not be in the best interests of the testatrix. The issue of disclosure goes to the very heart of the attorney-

client relationship. The injury to society resulting from such disclosure would be far greater than any benefit to be derived. The very purpose of the attorney client privilege is to enable one to fully disclose his thoughts and facts in order to obtain counsel and advice. The very existence of the privilege is founded on trust and confidence. Rarely will one make full disclosures if he knows that these disclosures may be used against him or that his inner most feeling and thoughts about his loved ones and friends will be subject to public airing at the whim of a dissatisfied and disgruntled heir.

If an attorney can be made to produce copies of former wills there is no reason why he cannot be made to disclose memorandum of conversations, letters and all other communications between his client and himself.

The only reported case that research has found dealing with this exact issue is *Ex Parte Hurin*, 59 Ohio App. 82, 17 N.E.2d, 287 (1938). In that case the following agreed statement of facts was presented to the Ohio Court of Appeals. The petitioner, an attorney-at-law, prepared a will for Laura Bell Woodward in 1934. Three years later he prepared another will which, after her death, was admitted to probate as her last will and testament. An action to contest the 1937 will was filed, and the petitioner was ordered to produce the former will. He refused to do so on the grounds, first, that it was not relevant, and, second, that it was privileged. The Ohio Court of Appeals held that although the instrument may be relevant to the issues, the petitioner could not produce it since it was prepared as a result of communications from his client and therefore "The 'reason and spirit' of the situation requires him to protect that communication by not disclosing it by producing the instrument for the benefit of those who seek to destroy the effect of his client's later testamentary efforts." (17 N.E. 2d at page 288).

Although the attorney client privilege is not a creature of statute in this jurisdiction, it nonetheless exists. In the

Elliott case, supra, the Court of Appeals said, at page 468:

> "Professional communications, made by client to an attorney, or communications passing between client and attorney, are, upon principles of public policy, and from the necessity of preserving confidence in all matters of business where the assistance or agency of an attorney is required, held to be privileged from disclosure; and this privilege is that of the client rather than that of the attorney. *This privilege embraces all communications made by the client to his attorney for and in course of the business for which the attorney may be employed. The latter cannot be permitted to disclose such communications, whether they be in the form of* title deeds, *wills,* documents, *or other papers delivered or statements made to him,* or of letters, entries, or statements, written or made by him in that capacity. (Cased cited). *The protection is not qualified by any reference to proceedings pending or in contemplation,* nor is it material that the client be in no manner before the court where disclosure is sought to be had.
>
> "'*If,* touching matters that come within the ordinary scope of professional employment, *they [legal advisers] receive a communication in their professional capacity,* either from a client, or on his account and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the course of their employment on his behalf, matters which they know only through their professional relation to the client, *they are not only justified in withholding such matters, but bound to withhold them,* and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as party or as witness.' (Cases cited).
>
> "It is true, the strict enforcement of the rule may, in some cases, operate to the exclusion of truth; but that does not justify the breaking down of a great

> principle of protection founded in wisdom and public policy, and necessary to be observed in the administration of an enlightened system of jurisprudence." (Emphasis added)

The statement of this Court is unambiguous. The privilege encompasses all communications and is not qualified by reference to any proceeding pending. The Court further admonishes that not only are attorneys justified in withholding such matters but are bound to do so. Thus, it is clear that the privilege does exist but that a waiver or exception to that privilege will be permitted only in certain instances where the existence will aid in interpreting the will and is not designed to destroy that will.

The evidence in this case is sought solely to defeat the intentions of the testatrix as stated in her last will dated September 20, 1965. Any evidence that she lacked the testamentary capacity or was unduly influenced to execute that will could not be obtained from prior wills but should be obtained from persons or things associated with the testatrix at the time of the execution of that instrument.

CONCLUSION

It is respectfully urged that for the reasons stated the trial Court erred in ordering Cornelius H. Doherty, Sr., executor, and as attorney, to produce for copying and inspection copies of prior wills of the testatrix, and, further, in adjudicating Cornelius H. Doherty, Sr. in contempt of Court for failing to produce these writings for inspection and copying.

It is respectfully urged that the judgment and order of the District Court be reversed with directions to vacate the order to produce and the order of contempt.

Patrick J. Attridge
1010 Vermont Avenue, NW
Washington, D.C.
Attorney for Appellant

TABLE OF CONTENTS

[Filed April 29, 1966]

The Last Will and Testament

of

ELIZABETH FAIRALL

I, ELIZABETH FAIRALL, a resident of the District of Columbia, do make, publish and declare the following to be my Last Will and Testament, hereby revoking any and all wills at any time heretofore made by me:

ITEM I: I direct my Executors, or the survivor of them, hereinafter named, to pay all my just debts and the expenses of my last illness, funeral and burial, in such amounts as they may deem proper, and as soon after my death as they may deem practicable.

ITEM II: I direct that my remains be placed in Rock Creek Cemetery provided by me during my lifetime.

ITEM III: I give and bequeath to my niece, Virginia Fairall, the sum of One Thousand ($1,000.00) Dollars, in cash, and in the event that she predeceases me, this legacy shall lapse.

ITEM IV: I give and bequeath to my niece, Elizabeth Fairall, the sum of One Thousand ($1,000.00) Dollars, in cash, and in the event that she predeceases me, this legacy shall lapse.

ITEM V: I give and bequeath to my niece, Lorene Fairall, the sum of One Thousand ($1,000.00) Dollars, in cash, and in the event that she predeceases me, this legacy shall lapse.

ITEM VI: I give and bequeath to Helmer McIntosh the sum of Five Thousand ($5000.00) Dollars, and in the event that he predeceases me, this legacy shall lapse.

ITEM VII: I give and bequeath to Mae Tonkin all furniture and wearing apparel not otherwise disposed of by me.

ITEM VIII: I give and bequeath to Lillian Burgess of Washington, D.C., my diamond ring square set in platinum.

ITEM IX: I give and bequeath to Lucie Noel of Paris, France, my wrist watch and other diamond ring.

ITEM X: I give and bequeath to Hannah Harrison School all books in my possession at the time of my death.

ITEM XI: I give and bequeath to the Corcoran Art Gallery the picture "Storm at Sea".

ITEM XII: All the rest and residue of my estate, of every kind and description, real, personal and mixed, wheresoever and howsoever situated, now owned, or that may hereafter be acquired by me, I hereby give, devise and bequeath to Jennings A. Snider.

ITEM XIII: I hereby name, constitute and appoint Cornelius H. Doherty and Cornelius H. Doherty, Jr., or the survivor of them, to be the Executors of this, my Last Will and Testament, and give to my said Executors, or the survivor of them, full power and discretion in the management and control of my estate, with right and power to sell all or any portion thereof which they may deem necessary or advisable for the payment of my just debts or the advantageous settlement of my estate, and no purchaser from my said Executors, or the survivor of them, shall be under any obligation to see to the application of the purchase money, and I expressly direct that they be not required to furnish any bond or undertaking.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal this 20th day of September, 1965.

/s/ Elizabeth Fairall (SEAL)

This instrument was this 20th day of September, 1965, signed, sealed, published and declared by ELIZ-

ABETH FAIRALL as her Last Will and Testament, in the joint presence of the undersigned, the said ELIZABETH FAIRALL being of sound and vigorous mind and free from any constraint or compulsion. Whereupon we, being without any interest in the matter, being acquainted with her but not members of her family, immediately subscribed our names hereto, in the presence of each other and of the said testatrix, for the purpose of attesting the said will as she requested us to do, on the day and year last hereinbefore written.

/s/ Leona L. Wright Address 440 Luray Pl. N. W.

/s/ Stanford Brown Address 1673 Park Rd. N.W.

[Filed April 29, 1966]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding Probate Court

DISTRICT OF COLUMBIA, to wit:

On this 29th day of April, A.D. 1966, personally appeared Cornelius H.Doherty who on oath says that he does not know of any will or codicil of Elizabeth Fairall late of said District, deceased, other than the instrument of writing hereunto annexed dated September 20th, 1965; that he received the same from the decedent during her lifetime for safekeeping and that said Elizabeth Fairall died on or about the 25th day of April, 1966.

/s/ Cornelius H. Doherty
1010 Vermont Ave., N. W.
Washington, D. C.

Sworn to and subscribed before me on the day aforesaid.

/s/ Margaret M. Quaid
Deputy Register of Wills
for the District of Columbia, Clerk of the Probate Court.

[Filed May 3, 1966]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding Probate Court

DISTRICT OF COLUMBIA, to wit:

On this 29th day of April, A.D. 1966 personally appeared Leona L. Wright, who on oath says that she is one of the subscribing witnesses to the foregoing paper-writing dated the 20th day of September, A.D. 1965, purporting to be a to the last will and testament of Elizabeth Fairall, deceased, late of the District of Columbia, that the Testatrix therein named signed said will in her presence; that said Testatrix published,pronounced and declared the same to be her last will and testament; that at the time of so doing said Testatrix was, to the best of affiants apprehension, of sound and disposing mind, and capable of executing a valid deed or contract; and that affiants name as witness to the aforesaid will was signed in the presence and at the request of Testatrix and in the presence of Stanford Brown the other subscribing witness, who also signed in the presence of the affiant, and in the presence and at the request of the Testatrix.

/s/ Leona L. Wright
440 Luray Pl. N.W.
Washington, D.C.

Sworn to and subscribed before me on the day aforesaid.

/s/ Margaret M. Quaid
Deputy Register of Wills for
the District of Columbia,
Clerk of the Probate Court.

[Filed May 3, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding Probate Court

DISTRICT OF COLUMBIA, to wit:

On this 29th day of April, A.D. 1966, personally appeared Leona L. Wright who on oath says that she was well acquainted with Stanford Brown and that affiant knows his handwriting, having often seen him write; that after examining the signature of Stanford Brown as one of the subscribing witnesses to the paper writing dated the 20th day of September, A.D. 1965, purporting to be the last will and testament of Elizabeth Fairall deceased, late of the District of Columbia, affiant declares the same to be in the identical handwriting of the said Stanford Brown and that it is well known to affiant that said Stanford Brown is deceased.

/s/ Leona L. Wright
440 Luray Pl. N.W.
Washington, D. C. 20010

Sworn to and subscribed before me on the day aforesaid.

/s/ Margaret M. Quaid
Deputy Register of Wills for
the District of Columbia
Clerk of the Probate Court.

Sworn to and subscribed before me on the day aforesaid.

/s/ Margaret M. Quaid
Deputy Register of Wills
for the District of Columbia, Clerk of the Probate Court.

[Filed May 3, 1966]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding Probate Court

DISTRICT OF COLUMBIA, to wit:

On this 29th day of April, A.D. 1966 personally appeared Leona L. Wright, who on oath says that she is one of the subscribing witnesses to the foregoing paper-writing dated the 20th day of September, A.D. 1965, purporting to be a to the last will and testament of Elizabeth Fairall, deceased, late of the District of Columbia, that the Testatrix therein named signed said will in her presence; that said Testatrix published,pronounced and declared the same to be her last will and testament; that at the time of so doing said Testatrix was, to the best of affiants apprehension, of sound and disposing mind, and capable of executing a valid deed or contract; and that affiants name as witness to the aforesaid will was signed in the presence and at the request of Testatrix and in the presence of Stanford Brown the other subscribing witness, who also signed in the presence of the affiant, and in the presence and at the request of the Testatrix.

/s/ Leona L. Wright
440 Luray Pl. N.W.
Washington, D.C.

Sworn to and subscribed before me on the day aforesaid.

/s/ Margaret M. Quaid
Deputy Register of Wills for
the District of Columbia,
Clerk of the Probate Court.

[Filed May 3, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding Probate Court

DISTRICT OF COLUMBIA, to wit:

On this 29th day of April, A.D. 1966, personally appeared Leona L. Wright who on oath says that she was well acquainted with Stanford Brown and that affiant knows his handwriting, having often seen him write; that after examining the signature of Stanford Brown as one of the subscribing witnesses to the paper writing dated the 20th day of September, A.D. 1965, purporting to be the last will and testament of Elizabeth Fairall deceased, late of the District of Columbia, affiant declares the same to be in the identical handwriting of the said Stanford Brown and that it is well known to affiant that said Stanford Brown is deceased.

/s/ Leona L. Wright
440 Luray Pl. N.W.
Washington, D. C. 20010

Sworn to and subscribed before me on the day aforesaid.

/s/ Margaret M. Quaid
Deputy Register of Wills for
the District of Columbia
Clerk of the Probate Court.

[Filed May 3, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Holding Probate Court

DISTRICT OF COLUMBIA, to wit:

On this 3rd day of May, A.D. 1966, personally appeared Eartha Brown who on oath says that she was well acquainted with Stanford Brown and that affiant knows his handwriting, having often seen him write; that after examining the signature of Stanford Brown as one of the subscribing witnesses to the paper writing dated the 20th day of September, A.D. 1965, purporting to be the last will and testament of Elizabeth Fairall deceased, late of the District of Columbia, affiant declares the same to be in the identical handwriting of the said Stanford Brown and that it is well known to affiant that said Stanford Brown is deceased.

/s/ Eartha Brown
3500 14 St. N.W.
Apt. 313

Sworn to and subscribed before me on the day aforesaid.

/s/ Aliene M. Ivory
Deputy Register of Wills for
the District of Columbia,
Clerk of the Probate Court.

[Filed May 5, 1966]

PETITION FOR PROBATE
AND LETTERS TESTAMENTARY

The petition of Cornelius H. Doherty and Cornelius H. Doherty, Jr., respectfully represents:

1. That your petitioners are citizens of the United States and residents of the County of Arlington, State

of Virginia, whose Post Office Address is 4719 North Rock Spring Road, Arlington, Virginia, and not under any legal disability, and they make this application as the Executors nominated in the will of the above named decedent.

2. That Elizabeth Fairall, late an adult citizen of the United States and a resident of the District of Columbia, and residing at 2800 Woodley Road, N. W., Washington, D. C., died on the 25th day of April, 1966, leaving a paper in the nature of a Last Will and Testament, bearing date the 20th day of September, 1965, which said paper is now on file in the Office of the Register of Wills for the District of Columbia; that no other paper in the nature of a testamentary disposition of the decedent's estate has been found, although search has been made, and your petitioners believe that the above mentioned paper, dated the 20th day of September, 1965, is in fact the Last Will and Testament of said decedent.

3. That your petitioners, Cornelius H. Doherty and Cornelius H. Doherty, Jr., are the Executors named in the Last Will and Testament of the said Elizabeth Fairall and as such Executors believe themselves entitled to letters testamentary on said estate. Item XIII of the said Last Will and Testament discloses that no bond or undertaking shall be required of her Executors.

4. That testatrix was never married and leaves as her only heirs at law and next of kin three (3) nieces; Virginia Fairall of 231 Jefferson Drive, Pittsburgh, Pennsylvania; Lorene Fairall, now Mrs. Lorene F. Wilmot, of 221 Parkside Avenue, Pittsburgh, Pennsylvania, and Elizabeth Fairall, now Mrs. Elizageth F. Vinton of 4710 Meadow Green Drive, Pittsburgh, Pennsylvania. The Said testatrix was not survived by a child or a descendant of a child, father, mother or descendants of a brother or sister, other than the nieces named above.

5. That decedent, so far as your petitioners have been able to ascertain, died possessed of the following personal property: on deposit at the Riggs National Bank, in savings and checking accounts, Fourteen Thousand Eight Hundred Eighty Dollars and Ninety Three Cents ($14,880.93); United States Bonds of the face value of Fifteen Thousand ($15,000.00) Dollars; eleven thousand thirty-eight (11,038) shares of the Common Stock of Julius Garfinckel & Company, at an approximate value of Four Hundred Sixty Thousand Eight Hundred Thirty-Six Dollars and Fifty Cents ($460,836.50); three hundred sixty-nine (369) shares of the Common Stock of Riggs National Bank of an approximate value of Thirty-Two Thousand Eight Hundred Forty-One ($32,841.00) Dollars, and jewelry of an approximate value of Fourteen Thousand ($14,000.00) Dollars.

6. That decedent, so far as your petitioners have been able to ascertain, died seized of no real estate in the District of Columbia or elsewhere.

7. That decedent, so far as your petitioners have been able to ascertain, left unsecured debts, including the expenses of her last illness and burial, amounting to approximately Twenty-Five Hundred ($2,500.00) Dollars.

8. That decedent, so far as your petitioners have been able to ascertain, left no secured debts.

WHEREFORE, petitioners pray:

1. That notice by citation or by publication or by both as may be necessary shall issue against the unknown heirs at law and next of kin of the decedent, requiring them, if any, to answer the exigencies of this petition.

2. That said paper writing dated the 20th day of September, 1965, be admitted to probate and record as The Last Will and Testament of said Elizabeth Fairall, deceased, as a Will of both real and personal property.

3. That letters testamentary issue to your petitioners as the Executors named in the Will upon the giving of a bond or undertaking by the said Cornelius H. Doherty and Cornelius H. Doherty, Jr. in such amount as the Court may determine.

4. For such other and further relief as the nature of the case may require and to the Court may seem just and proper.

/s/ Cornelius H. Doherty

/s/ Cornelius H. Doherty, Jr.

/s/ Cornelius H. Doherty
Attorney for Petitioners.

I personally guarantee the payment of costs amounting to $15.00.

/s/ Cornelius H. Doherty
Attorney.

[Jurat]

[Filed May 5, 1966]

CONSENT TO PROBATE AND NOMINAL BOND

We, the undersigned, being adults and heirs at law and next of kin of Elizabeth Fairall, deceased, having read and being fully acquainted with the contents of the Will of Elizabeth Fairall, bearing date of the 20th day of September, 1965, and having read and being familiar with the contents of the petition of Cornelius H. Doherty and Cornelius H. Doherty, Jr. for the probate of said Will and for letters testamentary, do hereby waive citation or notice by publication, and we hereby expressly waive our right to file a caveat to said Will, either before or after it is granted probate, and we do hereby consent and request as follows: That the said Will bearing date the 20th day of September, 1965, be admitted to probate and record as a Will of real and

personal property; that letters testamentary be granted to Cornelius H. Doherty and Cornelius H. Doherty, Jr., the executors nominated in said Will; and that said executors be permitted to qualify by filing an undertaking in a nominal amount, and without regard to protection of our several legacies or interests in said estate.

May 2, 1966.

Witness:

/s/ Harry A. Vinton	/s/ Virginia Fairall
/s/ Harry A. Vinton	/s/ Lorene Fairall, now Lorene F. Wilmot
/s/ Harry A. Vinton	/s/ Elizabeth Fairall, now Elizabeth Vinton

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[Filed May 6, 1966]

ORDER FOR PROBATE AND LETTERS TESTAMENTARY

Upon consideration of the petition of Cornelius H. Doherty and Cornelius H. Doherty, Jr., for probate and letters testamentary filed herein on the 5th day of May, 1966, and it appearing to the satisfaction of the Court that the Last Will and Testament of Elizabeth Fairall, deceased, bearing date the 20th day of September, 1965, has been duly proven and that all the heirs at law and next of kin of said decedent have consented to the probate of the said Will and the appointment of your petitioners, and no objections having been filed, it is by the Court this 6 day of May, 1966,

ADJUDGED, ORDERED and DECREED that the said Will be and is hereby admitted to probate and record as a Will of real and personal property, and that letters testamentary are granted and shall issue to Cornelius H. Doherty and Cornelius H. Doherty, Jr., the Executors named in said Will, provided that Cornel-

ius H. Doherty and Cornelius H. Doherty, Jr., first file their undertaking in the penal sum of Sixty-Four Thousand Dollars, with surety approved by the Court, conditioned for the faithful performance of their trust, and provided they file the power of attorney required of non-residents by Section 20-118 of the District of Columbia Code.

/s/ Alexander Holtzoff
Judge

[Filed November 2, 1966]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

VIRGINIA FAIRALL
231 Jefferson Drive
Pittsburgh, Pennsylvania

LORENE FAIRALL WILMOT
731 Highland Avenue
Lewistown, Pennsylvania 17044

and

ELIZABETH FAIRALL VINTON
4710 Meadowgreen Drive
Pittsburgh, Pennsylvania

Plaintiff

vs.

Administration
No. 116,730

CORNELIUS H. DOHERTY, SR.
CORNELIUS H. DOHERTY, JR.
Executors of the Estate of
Elizabeth Fairall
1010 Vermont Avenue, N.W.
Washington, D. C.

Defendants

COMPLAINT TO CONTEST THE VALIDITY OF WILL

Virginia Fairall, Lorene Fairall Wilmot and Elizabeth Fairall Vinton, Plaintiffs herein, respectfully represent to this Honorable Court:

1. That they are citizens of the United States and residents of the State of Pennsylvania and that they are nieces and the only heirs at law and next of kin of Elizabeth Fairall, deceased and are of full age.

2. That they have noted that a certain paper writing bearing date the 20th day of September, 1965, has been filed in this court as the Last Will and Testament of

said Elizabeth Fairall, deceased, naming as legatees of her estate the following persons:

Virginia Fairall 231 Jefferson Drive Pittsburgh, Pennsylvania	$1,000.00 cash
Elizabeth Fairall Vinton 4710 Meadowgreen Drive Pittsburgh, Pennsylvania	$1,000.00 cash
Lorene Fairall Wilmot 731 Highland Avenue Lewistown, Pennsylvania	$1,000.00 cash
Helmer McIntosh 183 East 85th Street New York, New York	$5,000.00 cash
Mae Tonkin (address unknown)	all furniture and wearing apparel
Lillian Burgess (address unknown)	diamond ring square set in platinum
Lucie Noel Paris, France	wrist watch other diamond ring
Hannah Harrison School 4470 MacArthur Blvd.,N.W. Washington, D.C.	all books
Corcoran Art Gallery 17th & New York Ave.,NW Washington, D.C.	picture "Storm at Sea"
Jennings A. Snider 11833 Farmind Drive Rockville, Maryland	rest and residue of Estate (estimated in Petition at approximately $550,000.00)

3. That they have heretofore executed on May 2, 1966, Consents to Probate and Nominal Bond, filed herein (on May 5, 1966;) that since executing said Consents they have obtained legal counsel and have caused an investigation to be made into the circum-

stances surrounding said paper writing and hereby revoke said Consents to Probate and Nominal Bond.

4. That their interests will be injuriously affected by the allowance of said pretended Will; that they hereby contest the probate and the validity of said paper writing purporting to be the Last Will and Testament of Elizabeth Fairall, deceased, and for that purpose on information and belief, allege:

FIRST: That the said paper writing bearing date the 20th day of September, 1965, is not the Last Will and Testament of said deceased.

SECOND: That the attesting witnesses to said alleged Will did not nor did anyone of them sign his or her name as a witness to the alleged Will at the request of and in the presence of the said Elizabeth Fairall.

THIRD: That the said deceased was not, at the time of making and subscribing of or the acknowledging of by her of said paper writing, of sound mind and memory or in any respect capable of making a Will.

FOURTH: That the said paper writing purporting to be the Last Will and Testament of said deceased, was obtained and the execution thereof procured from the said Elizabeth Fairall by the undue influence, duress, coercion exercised upon her by one Jennings A. Snider, or by some other person or persons unknown to Plaintiffs.

5. That the Defendants Cornelius H. Doherty, Sr., and Cornelius H. Doherty, Jr., are executors nominated in said paper writing.

WHEREFORE, the premises considered, Plaintiffs pray:

1. That process may issue from this court requiring the parties in interest to answer the allegations of this Complaint.

2. That service be obtained against the executors nominated and the legatees named in the alleged Will of Elizabeth Fairall, deceased, by personal service upon residents of the District of Columbia and by publication or substituted personal service upon non-residents of the District of Columbia who cannot be found therein for personal service.

3. That the Consents to Probate and Nominal Bond filed by these Plaintiffs in Administration No. 116,730 be revoked.

4. That trial by jury be had on all issues raised herein including the execution and the validity of the alleged Will.

5. That the probate of the alleged Will of Elizabeth Fairall, deceased, be revoked and distribution of this estate be in accordance with the laws of intestacy of the District of Columbia.

6. And for such other and further relief as to the court may seem meet and proper.

/s/ Virginia Fairall

/s/ Lorene Fairall Wilmot

/s/ Elizabeth Fairall Vinton

Plaintiffs demand trial by jury as to all issues.

/s/ Newton Frohlich

[Jurat]

[Filed November 25,1966]

ANSWER TO COMPLAINT

The defendants, Cornelius H. Doherty and Cornelius H. Doherty, Jr., through their attorney, in answer to the complaint to contest the validity of will submit the following:

1. The defendants admit that the plaintiffs are citizens of the United States and residents of the State of Pennsylvania and that they are the nieces of the decedent, Elizabeth Fairall, and are of full age.

2. That the decedent, Elizabeth Fairall, left a certain paper writing dated September 20, 1965, which has been filed in this Court as the Last Will and Testament of Elizabeth Fairall, deceased, and naming the defendants, Cornelius H. Doherty and Cornelius H. Doherty, Jr. as the Executors of her said will and the said will has been exhibited, proved and recorded in the Office of the Register of Wills and administration was granted on the 9th day of May, 1966, to the defendants.

3. The defendants admit the allegations of paragraph 2 of the complaint.

4. The defendants admit that plaintiffs executed consents to the probate of the will and a nominal bond as alleged in paragraph 3 of the complaint, but deny each and every other allegation contained therein.

5. Answering paragraph 4 of the said complaint the defendants aver as follows:

First: The defendants deny the allegation that the paper writing bearing date the 20th day of September, 1965, is not the Last Will and Testament of Elizabeth Fairall.

Second: The defendants deny the allegation that the attesting witnesses to said will did not sign their names as witnesses thereto at the request and in the presence of the said Elizabeth Fairall.

Third: The defendants deny the allegation that the said Elizabeth Fairall was not, at the time of the making and subscribing or of the acknowledging by her of said paper writing, of sound mind and memory or in any way capable of making a will.

Fourth: The defendants deny that the said paper writing admitted to probate as the Last Will and Testament of Elizabeth Fairall was obtained and the execution thereof procured from the said Elizabeth Fairall by the undue influence, duress and coercion exercised upon her by Jennings A. Snider, or by any other person or persons.

6. The defendants admit that they are the Executors nominated in said paper writing and that administration has been granted to them on the will of Elizabeth Fairall.

7. Further answering, the defendants say that the said paper writing dated September 20,1965, is the last will and testament of Elizabeth Fairall, deceased, that, at the time of the execution thereof, the said Elizabeth Fairall was of sound and disposing mind and capable of executing a valid will, deed or contract; that at the date of her execution of said will, the decedent declared to the attesting witnesses that said paper writing was the last will and testament of her, the said Elizabeth Fairall; that all of the attesting witnesses signed their names as witnesses to the said will at the request of the said Elizabeth Fairall, and in her presence; and that the said paper writing was not executed under fraud, coercion, duress or undue influence of Jennings A. Snider, or of any other person or persons whatsoever.

8. Further answering, the defendants say that they are willing that issues may be framed and tried be-

fore a jury, as by law provided, in order that the truth of the allegations of the aforesaid caveat may be determined.

/s/ Cornelius H. Doherty

/s/ Cornelius H. Doherty, Jr.

/s/ Patrick J. Attridge
Attorney for Defendants

[Jurat]

[Certificate of Service]

[Filed December 15. 1966]

INTERROGATORIES

TO: Cornelius H. Doherty, Sr., Esq., Defendant
1010 Vermont Avenue, N. W.
Washington, D. C. 20005

The following interrogatories are addressed to you pursuant to Rule 33 of this court. You are required to answer them separately and fully in writing under oath and to serve a copy thereof upon SACHS, GREENEBAUM & FROHLICH, 839 17th Street, N.W., Washington, D. C. 20006, Attorneys for Virginia Fairall, et al., within 15 days from receipt thereof.

1. State whether you have in your possession, custody and control, original or copy of a will or wills of Elizabeth Fairall, whether the same were executed prior or subsequent to the proported will of September 20, 1965, and if so, state as to each

(a) The date when same was executed,

(b) Whether it is an "original" or a carbon copy of a typed copy, and

(c) A description of the document in terms of its terms, number of pages, witnesses, etc.

2. State whether you have in your possession, custody or control, any unexecuted original or copy of any will or wills of Elizabeth Fairall or draft of same. If so, state as to each

(a) The date when same was prepared, specifically, or approximately,

(b) Whether it is an "original" typed copy of a carbon or other copy, and

(c) A description of the document in terms of its terms, number of pages, witnesses, etc.

3. State the date and description of each letter or other written communication in your possession, custody or control from Elizabeth Fairall and as to each document state in a general way the contents of same, i.e., whether they refer to instructions as to the making of her will, comments concerning her will, or otherwise,

4. State the date and description of each letter or other written communication in your possession, custody or control from Jennings A. Snider and state as to each, in a general way, the contents of same, i.e., whether it refers to Miss Fairall, her will, Mr. Snider's personal or legal affairs.

5. State the date and description, including the name and address of the writer, of any written communication in your possession, custody or control from any person from whom you have received a written communication relating to the will, or disposition of the estate, of Elizabeth Fairall.

6. State the date and the substance of any written communications or memoranda made by you or your partners or associates in your possession, custody

or control relating to the will, or disposition of the estate, of Elizabeth Fairall.

SACHS, GREENEBAUM &
FROHLICH

/s/ Newton Frohlich
S. S. Sachs
Attorneys for Plaintiff

[Certificate of Service]

[Filed December 16, 1966]

OBJECTIONS TO INTERROGATORIES

Comes now the defendant, Cornelius H. Doherty, Sr., by and through his attorney, and specifically objects to each and every interrogatory filed herein, and for reasons therefore refers the Court to the Memorandum of Points and Authorities annexed hereto.

/s/ Patrick J. Attridge
Attorney for Defendants

[Certificate of Service]

[Filed January 13, 1967]

PLAINTIFFS' MOTION TO COMPEL
ANSWERS TO INTERROGATORIES

Plaintiffs move this court to compel defendant Cornelius H. Doherty, Sr., to answer all Interrogatories propounded to him and as reasons therefor state as follows:

1. Plaintiffs, as devisees under decedent's will, and as the only heirs at law and next of kin of Elizabeth Fairall, deceased, have by their Complaint herein contested the validity of the decedent's Will.

2. Defendants, the executors of said Will, answered said Complaint denying the material allegations thereof.

3. Plaintiffs propounded Interrogatories to one of said executors pursuant to Rule 33, Federal Rules of Civil Procedure, seeking information relating to the existence of the following documents:

A. Prior Wills, or drafts of same, of the decedent (Interrogatories 1 and 2).

B. Written communications from the decedent to Cornelius H. Doherty, Sr., relating to her Will (Interrogatories 3).

C. Written communications from Jennings A. Snider (the person plaintiffs allege to have procured decedent's Will by undue influence, duress or coercion) or any other person to Cornelius H. Doherty, Sr., relating to the decedent's Will or Mr. Snider's personal or legal affairs (Interrogatories 4 and 5).

D. Any other written memoranda of Cornelius H. Doherty, Sr., or his partners or associates, relating to the Will or disposition of the estate of Elizabeth Fairall (Interrogatory 6).

4. Defendant Cornelius H. Doherty, Sr., the executor nominated in the Will of the deceased, has objected to the aforegoing Interrogatories on the ground that the information sought was obtained during the lifetime of decedent while he was her attorney and is therefore privileged.

5. It is respectfully submitted that as to the information sought by Interrogatories 4 and 5, clearly there is no privilege question as the information sought does not involve a communcation between the decedent and Mr. Doherty. Further, it is respectfully submitted that as to the information sought by Interrogatories 1, 2, 3 and 6, while the documents do relate to possible communications between the deceased and her attorney, (a) the fact of their existence has

not yet been established, and Answers to Interrogatories should be furnished to establish such existence and (b) under the doctrine established by the Supreme Court in Glover vs. Patten, 165 U.S. 394, 407 (1897) as followed in Clark vs. Turner, 87 U.S. App. D.C. 54, 183 F.2d (1950), the attorney-client privilege may not be raised by Mr. Doherty in these circumstances. In this connection, Plaintiffs respectfully refer this court to its Points and Authorities in support hereof.

6. The information sought in each Interrogatory is necessary to the Plaintiffs' preparation of an appropriate motion under Rule 34, Federal Rules of Civil Procedure, which requires reasonable specification of documents sought to be produced.

WHEREFORE, Plaintiffs pray that their Motion to Compel Answers to Interrogatories be granted.

SACHS, GREENEBAUM & FROLICH

By_____
Newton Frohlich
Peter R. Sherman

Attorneys for Plaintiffs

[Filed February 1, 1967]

RECOMMENDATION OF PRETRIAL EXAMINER

Upon consideration of the objections of defendants to the interrogatories propounded by plaintiffs, plaintiffs' reply thereto, and oral argument thereon, it is this 31st day of January, 1967, RECOMMENDED:

(1) That the objections to Interrogatories No. 1, 2, 3, 4, and 6 as framed be sustained, but that defendants answer said interrogatories reframed as follows:

1. (a) State whether you have in your possession, custody, or control, the original or a copy of any will or wills of Elizabeth Fairall executed prior or subsequent to the purported will of September 20, 1965.

(b) If so, as to each, give the date when such will was executed; and

(c) State whether it is an original, a carbon copy, or a typed copy.

2. (a) State whether you have in your possession, cutody, or control, any unexecuted original or copy of any proposed will or wills drafted at the request of Elizabeth Fairall.

(b) If so, as to each, give the date (specific or approximate) when drafted; and

(c) State by whom said will was drafted.

3. (a) State whether you have in your possession, custody, or control any written communication from Elizabeth Fairall giving instructions as to the drafting of her will.

(b) If so, as to each such communication, state the date (specific or approximate) thereof:

(c) State whether said communication was written or signed by Elizabeth Fairall; and

(d) If not written or signed by Elizabeth Fairall, from or through whom such written communication was received.

4. (a) State whether you have in your possession, custody, or control any written communication from Jennings A. Snider containing instructions as to the drafting of a will for Elizabeth Fairall.

(b) If so, state the date of each such communication.

6. (a) State whether you have in your possession, custody, or control any written communication or memorandum by you or your partners or associates concerning the drafting of a will for Elizabeth Fairall.

(b) If so, give the date of each such written communication or memorandum; and

(c) State the nature thereof (e.g. memorandum, note, or other) and by whom made.

(2) That the objection to Interrogatory No. 5 be sustained.

(3) That defendants file answers to said Interrogatories on or before February 20, 1967.

/s/ Elizabeth Bunten
Assistant Pretrial Examiner

Note: Under Local Civil Rule 9(i)(1) the above Recommendation becomes the order of the Court unless objections thereto are filed within five days in conformity with Rule 9 (i)(2).

COPIES MAILED TO COUNSEL January 31, 1967.

/s/ E.B.

[Filed February 1, 1967]

RECOMMENDATION OF PRETRIAL EXAMINER

Upon consideration of plaintiffs' motion to compel answers to interrogatories, defendants' opposition thereto, and oral argument thereon, it is this 31st day of January, 1967,

RECOMMENDED that said motion be denied.

/s/ Elizabeth Bunten
Asst. Pretrial Examiner

Note: Under Local Civil Rule 9 (i) (1) the above Recommendation becomes the order of the Court unless objections thereto are filed within five days in conformity with Rule 9 (i) (2).

[Certificate of Service]

[Filed February 14, 1967]

ANSWER TO INTERROGATORIES

Comes now Cornelius H. Doherty, Sr., through his attorney, and for answer to the interrogatories under the recommendation of the pre-trial examiner submits the following:

1. (a) I have executed file copies of wills dated December 5, 1941, August 16, 1944, and January 17, 1951, the original of these wills having been destroyed.

(a) See "a".

(c) Carbon copies.

2. (a) Yes.

(b) January 9, 1953, March 8, 1957 and September 20, 1965

(c) Myself.

3. (a) No.

4. (a) No.

6. (a) No.

CORNELIUS H. DOHERTY, SR.

By_____
Patrick J. Attridge
Attorney for Defendants

[Jurat]

[Certificate of Service]

[Filed February 24, 1967]

MOTION FOR PRODUCTION OF DOCUMENTS PURSUANT TO RULE 34

Plaintiffs move the court for an Order requiring Defendant Cornelius H. Doherty, Sr.

(1) To produce and permit Plaintiffs to inspect and to copy each of the following documents:

(a) Executed file carbon copies of will dated December 5, 1941 of Elizabeth Fairall.

(b) Executed file carbon copies of will dated August 16, 1944 of Elizabeth Fairall.

(c) Executed file carbon copies of will dated January 17, 1951 of Elizabeth Fairall.

(d) Unexecuted original or copy of proposed will drafted at the request of Elizabeth Fairall on or about January 9, 1953.

(e) Unexecuted original or copy of proposed will drafted at the request of Elizabeth Fairall on or about March 8, 1957.

(f) Unexecuted original or copy of proposed will drafted at the request of Elizabeth Fairall on or about September 20, 1965.

Defendant Cornelius H. Doherty, Sr. has the possession, custody, or control of each of the foregoing documents. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit A attached hereto and made a part hereof.

SACHS, GREENEBAUM & FROHLICH

By _____
Sidney S. Sachs,
Newton Frohlich

[Certificate of Service]

[Filed March 1, 1967]

MEMORANDUM IN OPPOSITION TO MOTION FOR PRODUCTION OF DOCUMENTS PURSUANT TO RULE 34

Comes now Cornelius H. Doherty, Sr., by and through his attorney, Patrick J. Attridge, and in opposition to the motion for the production of documents pursuant to Rule 34 says:

1. That the motion filed herein is directed to Cornelius H. Doherty, Sr. in his individual capacity and not in his capacity as Executor of the Estate of Elizabeth Fairall, deceased. Rule 34 is applicable only to parties.

2. Rule 34 provides that the Court may order the production of documents from a party upon a showing of "good cause" and provided the documents sought are not privileged.

The condition precedent of "good cause" requires more than a conclusory statement by counsel for the moving party that the matters sought to be produced contained evidence relevant or material to the issues or reasonably calculated to lead to the discovery of such evidence and that the denial of discovery would be unduly prejudicial. Groover, Christie & Merritt v. Lo Bianco, 119 U.S. App. D.C. 50, 336 F.2d 969 (1964).

In the absence of showing that there was any real reason or necessity for the production and further there being no showing that a denial of production would unfairly prejudice the movement or cause him undue hardship or injustice, the motion should be denied. Safeway Store, Inc. v. Reynolds, 85 U.S. App. D.C. 194, 176 F. (2d) 476 (1949).

The rule contemplates an exercise of judgment and discretion by the trial Court and not a mere automatic granting of the motion. Martin v. Capital Transit Company, 83 U.S. App. D.C. 239, 170 F. (2d) 811 (1948).

In the instant case counsel for the movement merely states "the documents contain information particularly relevant to the issues in this will contest" and "that prior wills and drafts of proposed wills unquestionably bear on decedent's testamentary plans generally and, in particular, on her testamentary capacity and on whether her September 20, 1965 will was the product of undue influence. . ." These are nothing more than vague and conclusory statements.

There being no showing of "good cause", it is respectfully submitted that the motion should be denied.

3. The second condition precedent for the production of documents from a party is that the material sought are "not privileged". The documents sought herein are prior wills and drafts of wills prepared by Cornelius H. Doherty during and through his professional relationship as attorney for the decedent, Elizabeth Fairall, and are therefor privileged from disclosure. The United States Court of Appeals in Elliott v. United States, 23 App. D.C. 456, at page 469, stated that an attorney cannot be made to disclose communications from his client ". . . whether they be in the form of titles, deeds, wills, documents or other papers delivered or statements made to him. . ."

Further, that an attorney is ". . .not only justified in withholding such matters, but bound to withhold them and will not be compelled to disclose the information or produce in any Court of law or equity either as a party or as a witness . . ."

It is respectfully submitted that the matters sought to be produced are privileged having been obtained as a result of the attorney-client relationship and therefore the motion to produce should be denied.

/s/ Patrick J. Attridge
Attorney for Defendants

[Certificate of Service]

[Filed April 12, 1967]

OBJECTIONS TO RECOMMENDATION OF THE ASSISTANT PRE-TRIAL EXAMINER

Comes now the defendant, Cornelius H. Doherty, Sr., Executor of the Estate of Elizabeth Fairall, and in opposition to the recommendations of the Assistant Pre-Trial Examiner dated April 7, 1967, says:

1. That the motion of the plaintiffs for the production of documents pursuant to Rule 34 is directed to the defendant, Cornelius H. Doherty, Sr., in his individual capacity, however he is not a party to this action, only Cornelius H. Doherty, Sr. as Executor of the Estate of Elizabeth Fairall, deceased. Since the motion of the plaintiffs is directed to Cornelius H. Doherty, Sr. in his individual capacity and not in his capacity as Executor of the Estate of Elizabeth Fairall, deceased, Rule 34 is inapplicable because it applies only to parties. There is a very real and distinct difference in these two capacities. The United States Court of Appeals for the District of Columbia in Ryan vs. McAdoo, 46 App. D.C. 117, held that an action against defendants individually could not be converted by the court into one against the defendants as Executors, nor an action against the Executor converted by the court into one against the defendant as an individual. Quoting from Austin vs. Munro, 47 N.Y. 360, the United States Court of Appeals said in the Ryan case, supra, at P. 122, "In the entitling of the summons and complaint, the case is stated to be against the defendants 'as executors'. . . . the form of the complaint, and the substantive averments therein, as well as the form of the judgment demanded, characterized the action as against the defendants in their respective capacity and not against them individually. . . . the word 'as', prefixed to the title of the defendants, indicates the character in which they are sued (citations omitted). The action cannot be converted into one against the defendants individually . . .".

In the instant case, Cornelius H. Doherty, Sr., individually and as attorney for the deceased, Elizabeth Fairall, has in his possession certain file copies and draft copies of wills of the deceased, Elizabeth Fairall, but these materials were prepared by him and are held by him in his individual capacity as an attorney. They are not in his possession as Executor of the Estate of the deceased. He has been made a party to this action as Executor and has not been sued as an individual. Rule 34 is specifically applicable only to parties to an action since the motion to produce is directed to Cornelius H. Doherty, Sr. as an individual, Rule 34 is not applicable. If it be said that it is directed to him as Executor, he cannot comply with the recommendations of the Assistant Pre-Trial Examiner because as Executor he does not have possession of these documents.

2. In addition to this very real distinction in capacity, Rule 34 provides that the court may order the production of documents from a party upon a showing of "good cause" and provided the documents sought are not privileged. The United States Court of Appeals for the District of Columbia in Groover, Christie & Merrit vs. LoBianco, 119 U.S. App. D.C. 50 336 F2d. 969 (1964) held that the phrase "good cause" requires more than a statement by counsel for the moving party that the matters which he seeks to have produced contain evidence relevant or material to the issue. The plaintiffs have filed this particular action contesting the validity of a will, and it is therefore assumed that before filing suit they had, in the opinion of their counsel, sufficient evidence to substantiate their position. If that be the case, there has been no additional showing of any real reason advanced by the plaintiffs for the production of these documents.

In Safeway Stores, Inc. vs. Reynolds, 85 U.S. App. D.C. 194, 176 F2d 476 (1949), the Court of Appeals stated that in the absence of a showing that there was any real reason or necessity for the production of the documents and further, there being no showing

that a denial of a motion for the production would unfairly prejudice the movant or cause him undue hardship or unjustice, the motion should be denied.

3. The second requirement for the production of documents from a party is that the material sought is "not privileged". As previously stated, the documents sought herein were prepared by Cornelius H. Doherty, Sr. as an attorney during and through his professional relationship with the deceased, Elizabeth Fairall. The defendant, Cornelius H. Doherty, Sr., Executor of the Estate of Elizabeth Fairall, does not have these document. Cornelius H. Doherty, Sr., individually as attorney, is in possession of these documents. The latter is not a party to this action, and if he were a party to this action, the documents sought are privileged.

The United States Court of Appeals in Elliott vs. The United States, 23 App. D.C. 456, at P. 469, held that an attorney cannot be made to disclose communications from his client ". . . whether they be in the form of titles, deeds, wills (emphasis added), documents or other papers delivered or statements made to him . . ." He ". . . not only (is) justified in withholding such matters, but bound to withhold them and will not be compelled to disclose the information or produce in any Court of law or equity, either as a party or as a witness . . .".

It is respectfully submitted that the recommendations of the Assistant Pre-Trial Examiner be denied, and the motion for production of documents be denied.

/s/ Patrick J. Attridge
Attorney for Defendants

[Certificate of Service]

[Filed May 17, 1967]

ORDER

Upon consideration of the Recommendation of the Pre-Trial Examiner, that Plaintiffs' Motion for Production of Documents Pursuant to Rule 34 be granted, and that Defendant Cornelius H. Doherty, Sr., Executor, make available to counsel for Plaintiffs for inspection and/or copying, or furnish copies of, certain documents listed in said Recommendation, and upon consideration of Objections to Recommendation of the Assistant Pre-Trial Examiner and Plaintiffs' Opposition to Defendants' Objections to Recommendation of Pretrial Examiner and oral argument having been had, it is this 17 day of May, 1967,

ORDERED that Defendants' Objections to Recommendation of the Assistant Pretrial Examiner be, and the same hereby are over-ruled and Defendant Cornelius H. Doherty, Sr., Executor, shall make available to counsel for Plaintiffs for inspection and/or copying, or furnish copies of, the following documents:

[1] Executed file carbon copies of wills of Elizabeth Fairall dated December 5, 1941, August 16, 1944, and January 17, 1951; and

[2] Unexecuted originals or copies of proposed wills drafted at the request of Elizabeth Fairall on or about January 9, 1953, March 8, 1957, and September 20, 1965.

/s/ William B. Jones
Judge

[Certificate of Service]

[Filed August 4, 1967]

MOTION FOR RELIEF FROM REFUSAL TO PRODUCE DOCUMENTS AND FOR REMOVAL OF EXECUTORS

Plaintiffs move for relief based on (a) Defendants' refusal to comply with an Order of this Court and (b) material misstatements by the Defendants in their Petition for Probate and Letters Testamentary.

A. Defendants have refused to comply with an Order of this Court.

1. On May 17, 1967, this Court entered an Order overruling Defendants' Objections to Recommendation of the Assistant Pre-Trial Examiner and ordering Defendant Corneilus H. Doherty, Sr., co-Executor of the Estate of Elizabeth Fairall, to:

> Make available to counsel for Plaintiffs for inspection and/or copying, or furnish copies of, the following documents:
>
> [1] Executed file carbon copies of wills of Elizabeth Fairall dated December 5, 1941, August 16, 1944, and January 17, 1951;
>
> [2] Unexecuted originals or copies of proposed wills drafted at the request of Elizabeth Fairall on or about January 9, 1953, March 8, 1957, and September 20, 1965.

2. Defendants refuse to produce said documents although they admit having them in their possession.

3. Defendants have not offered any reason for failure to comply with said Order other than that they do not agree with it.

B. Defendants have made material misstatements in their Petition for Probate and Letters Testamentary.

1. Notwithstanding their admissions that there are other papers in the nature of testamentary dispositions of the decedent's estate in their possessesion, Defendants filed Petition for Probate and Letters Testamentary herein, in which they alleged as follows:

> 2. That Elizabeth Fairall, late an adult citizen of the United States and a resident of the District of Columbia, and residing at 2800 Woodley Road, N.W., Washington, D.C., died on the 25th day of April, 1966, leaving a paper in the nature of a Last Will and Testament, bearing date the 20th day of September, 1965, which said paper is now on file in the Office of the Register of Wills for the District of Columbia; that no other paper in the nature of a testamentary disposition of the decedent's estate has been found, although search has been made, and your petitioners believe that the above mentioned paper, dated the 20th day of September, 1965, is in fact the Last Will and Testament of said decedent. (underlinings supplied)

In this case, Plaintiffs have filed caveats to the purported last will and testament dated September 20, 1965, of their aunt, Elizabeth Fairall. Plaintiffs have alleged in essence that the will was invalid on the grounds, inter alia, that the deceased was of unsound mind and memory, and the execution thereof secured from the deceased by the undue influence, duress and coercion exercised upon her by one Jennings A. Snider or some other person or persons unknown to Plaintiffs.

Plaintiffs are informed and believe that Jennings A. Snider was a business advisor and confidant of the deceased, who kept the records of and managed her financial affairs and who held a power of attorney over her affairs at various times, including some months immediately preceding her death. By virtue of decedent's purported will executed some six months

before the deceased died at the age of approximately 85, Jennings A. Snider inherited the bulk of decedent's estate of approximately $600,000.

Where there is activity toward procurement of a will by a person in a confidential relationship toward the testatrix during her life, and the will thus procurred conferred a benefit upon the person who, while occupying a possession of confidence, participated in procurring the execution of the will, the caveat establishes the basis for the presumption of undue influence. Under such circumstances, Defendants, the proponents of the will, have the burden of rebutting the presumption of undue influence raised. See Haggerty v. Olmstead, 39 App. DC 170 (1912); Mersch, Probate Practice in the District of Columbia, Section 745 (1952).

By their conduct, Defendants have attempted to arrogate to themselves the function of this court in matters of probate.

1. By their refusal to produce prior wills of decedent, admittedly in their possession and relative to the central issues' of this case, they have failed to comply with an Order of this Court and failed to meet the very minimum requirements of their burden of coming forward to rebutt the presumption of undue influence surround this will.

2. By their representation to the Court that no other wills existed, they have misled the Court.

WHEREFORE, Plaintiffs pray:

1. That this court enter an order striking Defendants' pleadings, render a judgment by default against Defendants, revoke the admission to probate of the September 20, 1965 paperwriting, appoint Plaintiffs as administratrices of this decedent's estate, and grant them reasonable counsel fees, or in the alternative.

2. Revoke Defendants' appointment as executors and appoint Plaintiffs as administratrices of this es-

tate or some other person to administer this estate as collector until the caveats herein have been disposed of, and award the Plaintiffs reasonable counsel fees.

SACHS, GREENEBAUM & FROLICH

By /s/ Sidney S. Sachs
/s/ Newton Frohlich
Attorneys for Plaintiffs

[Certificate of Service]

[Filed August 10, 1967]

ANSWER TO MOTION FOR RELIEF FROM REFUSAL TO PRODUCE DOCUMENTS, ETC.

Counsel for the defendants, Cornelius H. Doherty and Cornelius H. Doherty, Jr., as Executors of the Estate of Elizabeth Fairall, is on vacation and the answer to this motion is made by Cornelius H. Doherty, Esquire, as an attorney and not as an Executor of the Estate.

The first part of the motion contains the statement that the defendants have refused to comply with an order of this Court. The record will disclose that Cornelius H. Doherty and Cornelius H. Doherty, Jr., as the Executors of the Estate of Elizabeth Fairall, do not have any records in their possession which is required under the order of the Court dated May 17, 1967.

The record in this case definitely discloses that there never was a refusal and that the records which are requested are the personal records of Cornelius H. Doherty as an attorney who represented the decedent over some thirty (30) years.

Counsel for the caveators were advised long before they filed the caveat that these papers were his

private papers and that under no circumstances would he turn over the papers to counsel for the plaintiffs until such time as an Appellate Court had decided that no privilege existed to Cornelius H. Doherty as an attorney to such papers.

The motion herein indicates that the defendants, as Executors, have not offered any reason for their failure to comply with the order of May 17, 1967, but the record does show that the Executors have pleaded that they do not have those records and that Cornelius H. Doherty, as an attorney, does have those records and that he has pleaded privilege.

The order referred to of May 17, 1967, was presented to the Court by counsel for the plaintiffs with the very definite knowledge that, first, Cornelius H. Doherty and Cornelius H. Doherty, Jr., as Executors, did not have the papers requested and, therefore, could not comply with such an order. Counsel did know that it was necessary that they proceed by a petition to hold Cornelius H. Doherty, as an attorney, in contempt of Court so that the matter might be finally disposed of, but nothing was done by counsel for the plaintiffs until the present motion was filed August 3, 1967, almost three (3) months after the order of May 17, 1967.

It may be said rather definitely that Cornelius H. Doherty, Jr. was not connected with this office until the time that the last will was prepared for the decedent and has never seen this file nor has the residuary legatee or his counsel.

The Defendants Have not Made any
Mis-statements in Their Petition for Probate

Counsel for the plaintiffs are becoming very careless in their statements to the Court and say that the defendants have made material misstatements in the petition for probate and set out paragraph 2 of that petition, and, among other things, underline the following:

> "that no other paper in the nature of a testamentary disposition of the decedent's estate has been found, although search has been made,"

Counsel for plaintiffs have stated that there are other papers in the nature of testamentary disposition in the possession of defendants and on the face of the record an individual need not be an attorney to understand that such a statement is really a mis-statement and made carelessly with reflection upon the character of the attorney involved in this matter.

Paragraph 2 contains the material which is necessary to present in a petition and the part relied upon by counsel for the plaintiffs is contained in the opening paragraph of the will of the decedent, which is as follows:

> "I, ELIZABETH FAIRALL, a resident of the District of Columbia, do make, publish and declare the following to be my Last Will and Testament, hereby revoking any and all wills at any time heretofore made by me:"

The statement of the decedent that all prior wills were revoked is in accordance with Title 18, Section 109 of the 1961 Edition of the District of Columbia Code, amended to 1966, which is as follows:

> "§ 18-109. Revocation of wills; revival.
>
> " (a) A will or codicil, or a part thereof, may not be revoked, except by implication of law, otherwise than by
>
> "(1) a later will, codicil, or other writing declaring the revocation, executed as provided by section 18-103 or 18-107;"

It would be most difficult to make any statement covering the revocation of a will than is contained in the foregoing and if the will is revoked, burned or destroyed in any way, surely a copy of that will is not of testamentary character and the retaining of copies

for your personal file certainly would not be the retaining of a paper of testamentary character as referred to in Title 18, Section 111 of 1961 Edition of the District of Columbia Code.

The Record Herein Contains Nothing to Support a Presumption of Undue Influence Surrounding this Will

Again it must be stated that counsel for the plaintiffs are a little bit more than careless in their use of words. It is true that plaintiffs have alleged that the will dated September 20, 1965, was invalid because the decedent was of unsound mind and memory and that the will was secured by the undue influence, duress and coercion exercised upon her by Jennings A. Snider or some other person unknown to plaintiffs.

In various conversations it has been indicated that Cornelius H. Doherty, as the attorney for the decedent, was counsel for Jennings A. Snider long before the petition was filed and that Cornelius H. Doherty did deny that fact. Even in the face of this denial counsel for the plaintiffs still inserted this statement in their caveat and apparently with the clear indication that Cornelius H. Doherty did work or joined with Jennings A. Snider in causing him to be named as the residuary beneficiary under the will of the decedent.

I do consider that this is a reflection upon myself as an attorney and it would appear that they are deliberate and this situation is something that requires some immediate disposition of these matters and from the record and from the information that this attorney has it is clear that the caveators have no evidence of any kind to sustain the proof of the allegations which they have made but are desirous of obtaining some settlement of their claim.

I, personally as an attorney, or as one of the Executors of the Estate of the decedent, could never

agree to any settlement of any kind in this case for I know that Jennings A. Snider nor anyone would be in a position to coerce or influence the decedent, even at the age of eight-five (85), to do something that she did not desire or intend to do.

There is another statement on page 4 of the motion that the Executors by their representations have mislead the Court, and a reading of the record to date will disclose the simple fact that the defendants as Executors, do not have any papers of any kind in their possession or held under their direction which could be made available to counsel for the plaintiffs and that these papers to which they refer are the personal papers of Cornelius H. Doherty as an attorney and in his personal file which are not of testamentary character.

In previous memoranda filed herein cases have been referred to which cover the law as to the distinction between an attorney for a decedent and in his capacity as an Executor. An Executor is designated as such by the decedent and there are certain definite obligations or requirements which an Executor must comply with as a matter of law. He cannot file an action in his personal capacity nor may he be sued for a matter pertaining to the estate in his personal capacity but must sue and be sued as the Executor of the Estate.

It is to be regretted that an attorney who is in the situation that Cornelius H. Doherty, as an attorney for the decedent in her lifetime, in order to protect a privilege which he honestly feels he is entitled to, should have to be held in contempt of Court in order that a final judgment be had and so that an appeal might be taken.

This counsel has, over the years, retained all of the files referring to any probate matters and in those records there are very many personal letters that should not be made available to any person at any time, and it would be well to know whether the

Appellate law in this jurisdiction would permit or require an attorney to produce his private papers under such circumstances so that if there would be such a ruling then counsel could be in a position to have destroyed his files on any probate matter.

Motion for Relief Should Be Denied

While Cornelius H. Doherty, as the attorney for the decedent, has claimed that his file as such attorney contains matters which are privileged, if the Court would accept from counsel for the decedent, in the form of an affidavit, the reference to the caveators in each of the wills previously made by the decedent and such reference is the affidavit to be checked by the Court from the copies in the possession of counsel, and that such affidavit would not be considered a waiver of the privilege of counsel, then this information would be available.

If this is not acceptable to the Court, Cornelius H. Doherty, as the attorney for the decedent, without any thought of being contemptuous but merely to protect a privilege, requests that the Court hold him in contempt so that this matter can be finally disposed of.

The defendants request that the motion for relief filed herein be denied on the basis that the record herein contains nothing to support this motion other than the careless allegations made by counsel for the plaintiffs.

/s/ Cornelius H. Doherty

[Certificate of Service]

[Filed September 20, 1967]

ORDER

This cause came on to be heard upon the motion of plaintiffs for an order removing the defendants as Executors of the Estate of Elizabeth Fairall, and hav-

ing been duly argued and considered, it is, by the Court, this 20th day of September, 1967,

ORDERED that the said motion be, and the same hereby is, denied.

/s/ Alexander Holtzoff
Judge

[Certificate of Service]

[Filed October 20, 1967]

ORDER

This cause came on to be heard upon the motion of the plaintiffs for an order striking the pleadings of the defendants, Cornelius H. Doherty and Cornelius H. Doherty, Jr., Executors of the estate of Elizabeth Fairall, deceased, rendering a judgment by default against the defendants, Cornelius H. Doherty and Cornelius H. Doherty, Jr., as Executors, revoking the admission to probate of the will dated September 20, 1965, appointing plaintiffs as administratrices of the decedent's estate and allowance of a reasonable counsel fee, and having been duly argued and considered, it is, by the Court, this 31 day of October 1967,

ORDERED that the said motion be, and the same hereby is, denied without prejudice for the plaintiffs to seek other appropriate relief.

/s/ William B. Jones
Judge

[Certificate of Service]

[Filed October 26, 1967]

MOTION TO ADJUDGE CORNELIUS H. DOHERTY, SR., IN CONTEMPT OF COURT FOR REFUSAL TO MAKE DISCOVERY

Plaintiffs move this court to adjudge Defendant Cornelius H. Doherty, Sr., individually and as Executor of the Estate of Elizabeth Fairall, in contempt of court for failure to comply with the Order of this Court entered May 17, 1967 by Honorable William B. Jones directing said Defendant Cornelius H. Doherty, Sr., to make available to counsel for Plaintiffs for inspection and/or copying, or furnish copies of, executed file carbon copies of prior wills of the decedent dated December 5, 1941, August 16, 1944 and January 17, 1951; and unexecuted originals or copies of proposed wills drafted at the request of Elizabeth Fairall, on or about January 9, 1953, March 8, 1957 and September 20, 1965.

This May 17, 1967 Order has been reaffirmed by two other judges of this court, orally on September 12, 1967, per Honorable Alexander Holtzoff, and October 23, 1967, per Honorable Matthew McGuire.

By their previous Motion for Relief from Refusal to Produce Documents and for Removal of Executors, Plaintiffs have requested relief other than to have Defendant adjudged in contempt but this Court has denied same without prejudice to seeking other relief including citing Defendant with contempt of court.

Accordingly, Plaintiffs have no other choice but reluctantly to move that this Court adjudge Cornelius H. Doherty, Sr., individually and Executor of the Estate of Elizabeth Fairall, in contempt of court.

Plaintiffs further pray that in lieu of confinement of Corneilus H. Doherty, Sr., or, in addition thereto, this court assess fines and reasonable attorneys' fees against Cornelius H. Doherty, Sr., either individually or as Executor of the Estate of Elizabeth Fairall, as are appropriate to the Court for his fail-

ure to comply with this court order and respectfully refer the court to the Points and Authorities and Affidavit filed in support hereof.

SACHS, GREENEBAUM & FROHLICH

/s/ Newton Frohlich
Attorneys for Plaintiffs

[Certificate of Service]

[Filed October 27, 1967]

ORDER

Upon consideration of the Partial Objections of the Defendants to the Recommendations of the Pre-Trial Examiner deferring the time within which the Plaintiffs are required to answer Interrogatories, and oral argument having been had, it is by this court this 27 day of October, 1967,

ORDERED that the Objections of Defendants to that portion of the Pre-Trial Examiner's Recommendations which deferred the time within which to answer the Interrogatories be sustained, and that Plaintiffs answer said Interrogatories, as reframed, stricken, or permitted by the Pre-Trial Examiner, within ten (10) days hereof, and it is further

ORDERED that the May 17, 1967 Order of this court requiring the production of certain documents by Defendant Cornelius H. Doherty, Sr. be and the same hereby is reaffirmed, and it is further

ORDERED that this matter be set for trial on the merits on January 15, 1968.

/s/ Matthew McGuire

[Filed November 22, 1967]

MOTION TO STRIKE PETITION FOR PROBATE AND LETTERS TESTAMENTARY OR, IN THE ALTERNATIVE, FOR A STAY OR FOR CONTEMPT OR REMOVAL OF EXECUTORS AND FOR ATTORNEYS' FEES

Plaintiffs move that this court (1) strike the Petition for Probate and Letters Testamentary herein, or, in the alternative, (2) stay these proceedings, or (3) find the Executors in contempt of court, or (4) remove them as executors and as reasons therefore state as follows:

1. By their Petition for Probate and Letters Testamentary, Defendants represented to this court that there were no documents of a testamentary nature other than the purported will of the decedent dated September 20, 1965. Thereafter, their Petition for Probate and Letters Testamentary was granted.

2. Defendant Cornelius H. Doherty, Sr. has admitted by Answers to Interrogatories that he has in his possession three executed carbon copies of prior wills of the decedent as well as drafts of three other wills.

3. By Order dated May 17, 1967, this court (Jones, J.) ordered Defendant Doherty, Sr. to Produce the three executed carbon copies of prior wills and three drafts of other wills. Defendant refused to produce same.

4. By Order dated October 27, 1967, this Court (McGuire, J.) reaffirmed the May 17, 1967, Order requiring Defendant to Produce the prior wills and drafts of same. Defendant nevertheless has refused to produce them.

5. Plaintiffs have filed Motion to Adjudge Cornelius H. Doherty, Sr. in contempt of court for refusal to make discovery and submitted a proposed Order to Show Cause to this court. By Memorandum dated November 14, 1967, this court reaffirmed its May 17, 1967, Order requiring the production of prior wills and other documents, but stated that in the exercise

of its discretion, it was dismissing the application for Rule to Show Cause without prejudice. Defendant continues to refuse to produce the three prior wills and the three drafts of other wills.

6. Plaintiffs respectfully submit that Defendants' representation to this court that there are no documents of a testamentary nature other than the one will that Defendants have chosen to file with this court, coupled with Defendants' refusal to comply with Orders of this court requiring the production of prior wills, constitute a frustration of the judicial processes in this matter. Such flaunting of this court's Orders and rules nullifies the proceeding and calls for the strictest sanctions. If Defendant is unwilling to abide by the Court's Orders, he should be held in contempt and if the court does not apply such sanction, he should be removed and the proceeding held to be a nullity and stricken.

7. In the alternative, Plaintiffs submit that further proceedings in this case must be stayed until Defendant has complied with the Orders of this Court. Otherwise, this case, now scheduled for trial on January 15, 1968, will be tried in the face of court Orders that have not been complied with, wills that have not been produced or filed, and without discovery to which Plaintiffs are plainly entitled.

8. In the alternative, Plaintiffs respectfully renew their Motion that Cornelius H. Doherty, Sr. be adjudged in contempt of court and that an Order to show Cause be issued to him, or, in the alternative, that Cornelius H. Doherty, Sr. and Jr. be removed as coexecutors and some other impartial person or persons be substituted.

9. Finally, Plaintiffs move that this court order Defendants to pay Plaintiffs reasonable attorneys' fees in connection with this Motion and Plaintiffs'

expense in attempting to obtain compliance by Defendants with the Orders of this court.

SACHS, GREENEBAUM & FROHLICH

/s/ Sidney S. Sachs
/s/ Newton Frohlich
/s/ Peter R. Sherman
Attorneys for Plaintiffs

[Certificate of Service]

[Filed January 5, 1968]

ORDER

This is a will contest. This cause came on to be heard on the motion of plaintiffs for an order striking the petition for probate and letters testamentary, or in the alternative, for a stay and/or contempt or removal of executors, and for attorneys' fees. The motion was predicated upon the failure of the senior executor named in the instant challenge to comply with an order of the Court of May 17, 1967 framed by Judge Jones and entered as such directing that there be made available to counsel for plaintiffs for inspection certain documents, to wit:

(1) Executed file carbon copies of wills of Elizabeth Fairall dated December 5, 1941, August 16, 1944, and January 17, 1951; and

(2) Unexecuted originals or copies of proposed wills drafted at the request of Elizabeth Fairall on or about January 9, 1953, March 8, 1957, and September 20, 1965.

At a hearing on October 27, 1967, the order of Judge Jones was reaffirmed.

The position of the defendant is and has been that he holds such documents in his capacity as an individual attorney and not as executor, and therefore

must refuse to produce the same because of attorney-client privilege, the instruments in question, therefore, being privileged matter.

The Court concludes and holds that while it respects the position taken by counsel and the individual respondent who is a lawyer of integrity and of many years experience, this position in the circumstances is untenable. It further concludes that in continuing to maintain the same, he leaves the Court no alternative but to implement that part of Rule 37(b), Federal Rules of Civil Procedure, which provides for appropriate sanctions for failure to comply with the order entered.

It therefore orders that the said respondent, as possessor of the documents referred to and as a prospective witness in the cause, is hereby adjudge guilty of contempt of Court for failure to obey its order of May 17, 1967 and October 27, 1967, hereinbefore referred to and herein set forth.

It is further ordered that this adjudication of contempt is a final order so that appeal may be immediately taken, and its implementation is suspended pending this appeal.

It is to be noted further that the senior executor-respondent formally waived personal appearance in this proceeding.

It is further ordered that plaintiffs' motion for reasonable attorneys' fees and expenses in connection with obtaining compliance with said orders is hereby deferred, without prejudice, and

It is further ordered that the plaintiffs' motion for a stay of trial in this cause be and hereby is granted, without prejudice to this Court's reviewing the matter of a stay at any time.

/s/ Matthew F. McGuire,
United States District Judge.

January 5, 1968

BRIEF FOR APPELLEES

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,734

CORNELIUS H. DOHERTY, SR., Executor,

Appellant

v.

VIRGINIA FAIRALL, LORINE FAIRALL WILMOT, and ELIZABETH FAIRALL VINTON,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

In the opinion of appellees, the questions are:

1. Are executed file carbon copies of wills of a decedent, in the possession of the decedent's attorney who is also Executor of the decedent's estate, privileged communications not subject to pretrial discovery in a suit attacking the validity of another will of the decedent which the decedent's attorney did file?

2. Are unexecuted originals or copies of proposed wills of a decedent drafted at her request, in the possession of her attorney who is also Executor of the estate, privileged communications not subject to pretrial discovery in a suit attacking the validity of another will of the decedent which the decedent's attorney did file?

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEES

COUNTER-STATEMENT OF THE CASE

On April 25, 1966, Elizabeth Fairall died in the District of Columbia at the age of 85 years. On May 5, 1966, appellant Cornelius H. Doherty filed Petition for Probate and Letters Testamentary representing in Paragraph 2 thereof that the decedent left "a paper in the nature of a Last Will and Testament, bearing date the 20th day of September, 1965, which said paper is now on file in the office of the Reg-

ister of Wills for the District of Columbia; that no other paper in the nature of a testamentary disposition of the decedent's estate has been found, although search has been made, and your Petitioners believe that the above-mentioned paper, dated the 20th day of September, 1965, is in fact the Last Will and Testament of said decedent."

Appellees are the decedent's three nieces and the decedent's only heirs at law and next of kin. At first, the three nieces executed Consents to Probate and Nominal Bond submitted to them by Appellant. Thereafter, however, on November 2, 1966, they filed a complaint to Contest the Validity of Will, revoking their consents and alleging that the September 20, 1965, paper writing is not the Last Will and Testament of the deceased, that the Will was not executed properly, that the deceased was not at the time of the making and subscribing of or the acknowledging of by her of the paper writing of sound mind and memory or in any respect capable of making a Will, and that the paper writing purporting to be the Last Will and Testament of said deceased was obtained and the execution thereof procured from the said deceased by the undue influence, duress and coercion exercised upon her by one Jennings A. Snider, or by some other person or persons unknown to plaintiff.

Appellees promptly propounded Interrogatories of Plaintiff addressed to Appellant. As reframed by the Pretrial Examiner, Interrogatory #1 requested that Appellant "State whether you have in your possession, custody or control the original or a copy of any Will or Wills of Elizabeth Fairall executed prior to or subsequent to the purported Will of September 20, 1965." As to the question, Appellant admitted that he had in his possession "executed file copies of Wills dated December 5, 1941, August 16, 1944, and January 17, 1951, the originals of these Wills having been destroyed." He stated that these copies of Wills were carbon copies. As reframed by the Pretrial Examiner, Interrogatory #2 requested that Appellant: "State whether you have in your possession, custody or control any unexecuted original

or copy of a proposed Will or Wills drafted at the request of Elizabeth Fairall." As to this question, Appellant admitted that he had in his possession "unexecuted originals or copies of proposed Will or Wills, which were drafted on January 9, 1953, March 8, 1957, and September 20, 1965."

Appellees moved for the production of the aforesaid documents. Appellant opposed the motion offering various reasons such as that he held the documents as an attorney and not as an Executor and therefore they were privileged, and that there was not sufficient good cause shown for their production because such documents did not reveal "unquestionably" decedent's testamentary capacity.

Notwithstanding Appellant's opposition, on May 17, 1967, the trial court (Judge Jones) ordered Appellant to produce all of the aforesaid documents. By order entered October 27, 1967, the trial court (Judge McGuire) reaffirmed the order requiring the production of these documents.

Appellees reluctantly sought an order of the trial court holding Appellant in contempt only after Appellant repeatedly refused to produce said documents and after Appellees exhausted all other attempts to obtain alternate relief from Appellee's refusal so to produce.

STATUTES, TREATIES, REGULATIONS AND RULES INVOLVED

Rule 42(b) Rules of the U.S. District Court for the District of Columbia:

> "(b) In an action to contest the validity of the will, the summons shall be directed to the proponent of the will, the heirs at law and next of kin of the deceased, the legatees and devisees named in the will and the legatees and devisees named in any prior will, if any."

Section 18-109. District of Columbia Code, 1967 Edition, as amended:

"Section 18-109. Revocation of wills, revival.

"(a) A will or codicil, or a part thereof, may not be revoked, except by implication of law, otherwise than by

"(1) a later will, codicil, or other writing declaring the revocation, executed as provided by Section 18-103 or 18-107; or

"(2) burning, tearing, cancelling, or obliterating the will or codicil, or the part thereof, with the intention of revoking it, by the testator himself, or by a person in his presence and by his express direction and consent.

"(b) A will or codicil, or a part thereof, after it is revoked, may not be revived otherwise than by its re-execution or by a codicil executed as provided in the case of wills, and then only to the extent in which an intention to revive is shown."

Section 18-111, District Columbia Code, 1967 edition, as amended:

"Section 18-111. Withholding Will.

"Whoever, having possession of a testamentary instrument, willfully neglects, for a period of 90 days after the death of the testator becomes known to him, to deliver it to the Probate Court, or to the Register of Wills, or to an Executor named in the instrument, shall be fined not more than $500."

Section 18-112, District of Columbia Code, 1967 edition, as amended:

"Section 18-112. Taking and carrying away or destroying, mutilating, or secreting will.

"Whoever, during the life or after the death of the testator, for a fraudulent purpose, takes and carries away, or destroys, mutilates, or secretes, a testamentary instrument, shall be imprisoned not more than five years."

Section 22-1404, District of Columbia Code, 1967 edition, as amended:

"Section 22-1404. Secreting or converting property, documents or assets of decedent's estate.

"Whosoever willfully and fraudulently makes away with, secretes, or converts to his own use any property, documents, or assets of any kind or nature belonging to the estate of a deceased person shall be punished by a fine not exceeding $2,000 or imprisonment for not more than two years, or both."

Section 22-1405, District of Columbia Code, 1967 edition, as amended:

Section 22-1405. Taking or concealing writings.

"Whoever, with intent to defraud or injure another person, shall take away or conceal any writings whereby the estate or right of such other person shall or may be defeated, injured, or altered shall suffer imprisonment for not more than 7 years."

SUMMARY OF ARGUMENT

Prior wills of the decedent must be produced by an attorney. It cannot be left to any individual to determine to himself whether a paper he finds is or is not the will of a decedent. If it purports to be a will or is in the nature of a will, it must be filed so that others interested may come to know of it and act accordingly. Unexecuted originals or copies of proposed wills drafted at the request of the decedent must also be produced as a valid exception to the attorney-client privilege in order to ascertain the testamentary intent of the decedent.

ARGUMENT

The documents which appellant has refused to produce are of two kinds: (1) *executed* carbon copies of three wills of the decedent dated December 5, 1941, August 16, 1944, and January 17, 1951; and (2) *unexecuted* originals or or copies of proposed wills drafted at the request of the decedent on or about January 9, 1953, March 8, 1957, and September 10, 1965.

As to the executed carbon copies of wills of the decedent, there is no question that they are "papers in the nature of testamentary dispositions" and must be filed. Appellees have found no case or statute which holds that if an attorney chooses to refer to executed wills as file copies or if they are written on onion skin paper with carbon print, then such documents are not papers in the nature of testamentary dispositions and therefore need not be filed. These papers should have been filed in court and the failure to do so can subject appellant to criminal penalties. See Sections 18-111, 18-112, and Sections 22-1404, 22-1405, District of Columbia Code, 1967 edition, as amended.

That Appellant must produce prior wills of the decedent is axiomatic and has been long recognized in this jurisdiction. As is stated in Mersh, Probate Practice in the District of Columbia, Section 781, pages 335-36 (1952):

> "A will is not the private property of the family of the deceased, nor of those persons who may be named in it . . . . It is not left to any individual to determine to himself whether a paper he finds is or is not the will of the decedent. If it purports to be a will or is in the nature of a will, it must be filed that others interested may come to know of it and act accordingly."

As to the second set of documents, namely, unexecuted originals or copies of proposed wills drafted at the request of Elizabeth Fairall on or about January 9, 1953, March 8, 1967, and September 20, 1965, they clearly fall within the excep-

tions to the attorney-client privilege. As was stated in *Clark v. Turner*, 87 U.S. App. D.C. 54, 183 F. 2d 141:

> "The attorney-client privilege, unless waived, excludes what would otherwise be relevant evidence; the justification for this is the public interest in protecting the confidential character of such relationships. Without such privilege, full interchange of information, which is necessary to the proper conduct of the relationship, would not be possible. *But because the privilege does preclude introduction of evidence, and thus hampers the trial court in correctly ascertaining the facts, it must be carefully confined in application to those situations which fall within the ambit of the purpose for which it was created.*" (Italics supplied) (87 U.S.App. D.C. at 55.)

Accordingly, in *Clark v. Turner*, supra, the court held that it was error for a trial court to exclude proffered evidence of the due execution of a lost will on the ground that the witness whose testimony was offered had been the attorney for the decedent and therefore the testimony was privileged and could not be received in the case. The court's reasoning is apposite to the instant case:

> "Here the client is dead. It is her disclosures which were sought to be introduced. They in no way discredit her. The proffer was of testimony as to the existence of the will and its contents. If decedent had executed a will, to exclude such testimony would defeat the carrying out of her intent, and certainly would in no way advance the purpose for which the privilege is granted." (87 U.S.App. D.C. at 55)

If testimony of an attorney as to due execution of a will since lost is not protected by an alleged attorney-client relationship, it follows that documentary evidence of existing prior drafts of wills certainly should not be excluded. The actual drafts prepared by an attorney are less speculative than the recollections of an attorney. If recollections are not protected by an attorney-client privilege, certainly writ-

ten drafts should not be. They, too, "in no way discredit her", to use the language of *Clark v. Turner, supra.*

In reaching its decision in *Clark v. Turner, supra,* the court specifically cited *Glover v. Patten,* 165 U.S. 408. In that case, daughters of the decedent sued to construe the will of their mother and to establish an indebtedness against that estate. They sought to introduce a document establishing the existence of that indebtedness. Their sister opposed their claims on the theory that the will operated as an extinguishment of the claims. At the trial, the court permitted testimony of an attorney friend of the decedent, whom she had consulted, as to the testatrix's intent *vel non* in the will to extinguish the debts. The court held at 165 U.S. page 406,

> " . . . [we] are of the opinion that in a suit between the devisees under a will, *statements made by the deceased to counsel respecting the execution of the will, or other similar documents, are not privileged.* While such communications might be privileged, if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin. (Italics supplied.)

In quoting from *Russell v. Jackson,* 9 Hare 387, the Supreme Court stated:

> *"In the cases of testamentary disposition, the very foundation on which the rule proceeds [confidentiality] seems to be wanting;* and in the absence, therefore, of any illegal purpose entertained by the testator there does not appear to be any ground for applying it . . . *That the privilege does not come in all cases, terminate with the death of the party, I entertain no doubt. That it belongs equally to parties claiming under the client as against parties claiming adversely to him, I entertain as little doubt; but it does not, I think, therefore follow that it belongs to the executors against the next of kin in such a case as the present."* (Italics supplied.)

For this court to rule otherwise would be to render a nullity the rule of dependent relative ~~ratification~~ revocation long recognized in this jurisdiction. In *Linkins v. Protestant Episcopal Cathedral Foundation*, 87 U.S.App.D.C. 351, 187 F.2d 357 (1950) the court held that where two prior wills contained residuary devises identical with that in the latest will (which will was drawn for the purpose of correcting former defects within 30 days of testator's death, and provisions in the latest will for the benefit of two religious insitiutions which were invalid under the statute providing that testamentary gifts for the benefit of any religious sect should be invalid if made within one month of death), the religious institutions were held entitled to receive devises for them under earlier wills under the doctrine of "dependent relative revocation" notwithstanding a revocatory clause in the latest will. It goes without saying, therefore, that it is quite possible that if the will of Elizabeth Fairall dated September 20, 1965, is found to be invalid, a prior will or wills made by the decedent may thereafter be held to be controlling as to her testamentary dispositions under the doctrine of dependent relative revocation.

That such interpretation is recognized by the United States Court of Appeals and by the United States District Court for the District of Columbia is clear. Rule 42(b) of the Local Rules reads, in pertinent part:

> "In an action to contest the validity of a will, the summons shall be directed to . . . the legatees and devisees named in the will *and the legatees and devisees named in any prior will, if any.*" (Italics supplied.)

Rule 42(b) recognizes therefore that if there are wills and prior wills *all* legatees and devisees involved shall be named. For the appellant to arrogate to himself the task of determining the valid will flies in the face of the local rules of court, the cases and the statutes.

That the drafts are important to determine the decedent's intent is clear, for example, from the *Linkins* case. There

the court made a careful comparison of the prior wills of the decedent. The court recognized that it would apply the doctrine of dependent relative revocation whether or not the prior wills were in existence. The court stated:

> "A person$'s intent to revoke a will could hardly be made clearer or more certain than by intentionally tearing it up or burning it. If a will thus destroyed survives revocation because the testator intended to but never did execute another will, we cannot see why a will purportedly destroyed by words should not survive that destruction if the testator meant it to survive until the newly executed will become effective." (87 U.S.App.D.C. at 354).

If such a document is valuable evidence of the testator's intent, a fortiori, an original or copy of a proposed will of the decedent is likewise valuable evidence in determining decedent's intent. As the *Linkins* court stated:

> "The doctrine of dependent relative revocation is basically an application of the rule that a testator's intention governs; it is not a doctrine defeating that intent." (*Ibid.*)

CONCLUSION

It is respectfully urged that for the reasons stated the trial court did not err in ordering Cornelius H. Doherty, Sr., Executor and as attorney to produce for copying and inspection executed copies of prior wills of the testatrix and unexecuted originals or copies of proposed wills drafted at the request of the testatrix. These documents are not only required by law to be produced, but are necessary for the court to discharge its responsibility in ascertaining the testatrix's true intention.

Therefore, the judgment and order of the District Court should be affirmed with costs taxed to appellant.

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REPLY BRIEF OF APPELLANT

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21734

CORNELIUS H. DOHERTY, SR., EXECUTOR

Appellant

v.

VIRGINIA FAIRALL, LORENE FAIRALL WILMOT, and ELIZABETH FAIRALL VINTON

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT

STATUTES, REGULATIONS AND RULES INVOLVED

"Rule 34. Discovery, and Production of Documents and Things for Inspection, Copying, or Photographing

"Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the pro-

visions of Rule 30(b), the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property of any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just. As amended Dec. 27, 1946, effective March 19, 1948."

REBUTTAL ARGUMENT OF APPELLANT

The complaint filed herein by the appellees is against the appellant in his capacity as Executor of the Last Will and Testament of Elizabeth Fairall, deceased. The motion that precipitated this appeal was a motion pursuant to Rule 34 of the Federal Rules of Civil Procedure to produce the documents in question. Rule 34 is only applicable, by its language, to the parties to the action. The only party to the action is the Executor, Cornelius H. Doherty, and as Executor the appellant has consistently stated that he is unable to comply with the order of Judge Jones, dated May 17, 1967 (J.A. 32), directing him to produce the documents on the grounds that as executor he does not have these documents but does hold them in his individual capacity as attorney.

There is a real and distinct difference in these two capacities. This Court, in Ryan v. McAdoo, 46 App. D.C. 117 (1917), recognized that distinction and held that an action against the defendants individually could not be converted

by the Court into one against the defendants as executors nor an action against the executors converted by the Court into one against the defendant as an individual.

The Court, nonetheless, on May 17, 1967 (J.A. 32) ordered the production of the documents pursuant to Rule 34, holding, in effect, that there is no distinction between Cornelius H. Doherty as an individual and as an executor.

Thereafter, on October 27, 1967, Judge McGuire entered an order reaffirming the order of Judge Jones of May 17, 1967 (J.A. 44). Since the only person over whom the Court had jurisdiction was the executor the order reaffirming, therefore, was still directed to the executor requiring him to produce documents which he did not have. Cornelius H. Doherty, as attorney, was never ordered by the Court to produce these documents and therefore cannot properly be held in contempt of Court. However, if he were properly before the Court and ordered to produce these documents his position would be as stated, that the documents are writings, the contents of which were prepared by him from information learned as a result of the attorney-client relationship and as such are privileged communications which cannot be revealed without violating the confidence bestowed on him by his client.

A further clarification is necessary as to the exact nature of the documents or instruments which are sought to be produced. Contrary to the appellees' statement, the only documents which Cornelius H. Doherty holds are carbon copies. He does not have any original papers, the originals having been destroyed by the testatrix herself.

The appellees state that there is no question that executed carbon copies of wills are "papers in the nature of testamentary disposition" and should have been filed and the failure to do so can subject the appellant to criminal prosecution, citing Section 18-111, 18-112 and Sections 22-1404, 22-1405, District of Columbia Code, 1967 Edition, as authority.

First of all, Section 18-111 makes no reference to file copies of wills, the originals of which have been purposely destroyed by the testatrix herself. Secondly, this section does not provide that all instruments be filed with the Court or Register of Wills for it clearly indicates that they may also be delivered to the Executor. If, as the statute provides, an instrument may be delivered to the Executor, it cannot logically follow that it should have been filed with the Court or Register of Wills. If this were intended the legislation certainly would have said so.

Section 18-112 is of no further support for the appellees' proposition for it merely provides for imprisonment upon proof that an individual took, carried away or destroyed, mutilated or secreted a testamentary instrument for a fraudulent purpose. The Last Will and Testament of the testatrix in the instant case has been duly filed and fully proved. Nothing has been carried away, destroyed, mutilated or secreted except that which had been done so by the testatrix herself.

Sections 22-1404 and 22-1405 are likewise not applicable and have no relevancy or materiality to these proceedings. They, as well as the two prior sections, are criminal statutes providing for fine or prison upon the intentional commission of certain acts. There is no requirement found in these sections which necessitates the filing of the instruments under consideration in this case.

Section 22-1404 makes it a crime to conceal property belonging to the estate. Certainly under the most liberal interpretation it cannot be contended that file carbon copies of former wills of the decedent in the hands of her attorney are properties of that decedent's estate. They are part of the attorney's file and belong to him alone.

Section 22-1405 makes it a crime to conceal any writing whereby the estate of another is defeated, injured or altered. The statute requires the existence of a writing. The only original writing in the instant case has been duly filed and probated. All the other original writings have

been purposely destroyed by the testatrix herself. Such an act symbolically destroyed all copies of the originals. Furthermore, this section must be read in conjunction with Section 18-111 which requires that any writing be turned over to anyone of three designated persons, one of whom is the Executor himself.

Further, the appellant has offered to file an affidavit with the Court quoting the portions of the carbon copies of the wills in his possession which made reference to the appellees, subject to verification as to the correctness and truthfulness of the affidavit by an *in camera* view by the Court of those portions of the copies of the wills which pertain to the appellees. This certainly should satisfy the curiosity of the appellees.

The appellees seek further support in Mersch "Probate Practice in the District of Columbia". However, there is nothing in Mersch that requires that an attorney file carbon copies of wills, the originals of which have been purposely destroyed by the testatrix, be filed with the Register of Wills' Office.

Nor is Clark v. Turner, 87 U.S. App. D.C. 54, 183 F.2d 141, of any help. For that was a proceeding seeking to prove a lost will not an action contesting the validity of a duly probated will by dissatisfied or discontended legatees. Decedent's intentions are manifest in the Last Will and Testament that was duly filed and admitted to probate. Her prior confidential communications and disclosures to her attorney should not be admitted unless there is some ambiguity in her duly probated Last Will and Testament. Resort then may be had to other instruments to determine her true intent. However, where there is no ambiguity or confusion, attempts to create the same should not be permitted by resort to other writings.

Appellees urge that if the duly probated will of September 20, 1965, is found to be invalid, a prior will or wills may thereafter be held to be controlling as to her testamentary disposition under the doctrine of dependent relative

revocation. This argument is placing the cart before the horse because until such time as the duly probated will has, in fact, been found to be invalid there is no need to inquire about the contents of former wills and their relationship to the doctrine of dependent relative revocation.

Appellees further urge that the appellant has arrogated to himself the task of determining if the carbon copies which he has are prior wills within the meaning of Rule 42(b) of the Local Rules. This statement, without any legal or factual support or reference, presupposes that carbon copies of former wills, the originals of which have been actually and purposely destroyed by the testatrix and actually revoked by her by specific reference to those wills in a later will, as provided in Section 18-109(a), are, in fact, prior wills. What more manifestation can a testatrix make of her intention that she no longer wants the instrument to be in existence than by physically tearing it up and by bolstering that physical act by specifically stating in a subsequent instrument that all prior writings are revoked. If the original has been destroyed by a testatrix it no longer exists, and there can be no prior wills. It, in fact, no longer exists, therefore, an attorney's file copies of the originals do not thereby become prior wills but remain what they are, namely, file copies of prior original wills which have been destroyed and revoked. Accordingly, common sense dictates that they are not prior wills to be filed as required by Local Rule 42(b).

The appellees make frequent reference and seem to premise their whole argument for the production of these documents on the theory that they are necessary in determining the decedent's intent. It is submitted, however, that the will of September 20, 1965, is a clear and unambiguous determination of just what legacies the testatrix intended to bestow and does not require a resort to any other documents when the testatrix's intent is unequivocal.

The allegations of the complaint are directed to the mental capacity and ability of the testatrix as of September

20, 1965. Surely her intentions as manifest in a number of writings executed over eight years prior to September 20, 1965, would not be of any assistance in determining her mental capacity and ability on September 20, 1965, especially when it is readily apparent that her desires are clearly, unequivocally, and unambiguously expressed. The appellees also allege that the witnesses did not sign their names at or in the presence of the testatrix. This bold allegation is made in spite of the fact that the affidavits of the surviving witness to the contrary are a matter of record (J.A. 4 & 5).

It is respectfully submitted that the appellees' sole purpose in seeking discovery of the contents of the revoked wills is to destroy the actual intent of the testatrix and secure for themselves the fruits of her bounty in derogation of her manifest and actual intent.

CONCLUSION

It is respectfully urged that for the reasons stated the trial Court erred in ordering Cornelius H. Doherty, Sr., executor, and as attorney, to produce for copying and inspection copies of prior wills of the testatrix, and, further, in adjudicating Cornelius H. Doherty, Sr. in contempt of Court for failing to produce these writings for inspection and copying.

It is respectfully urged that the judgment and order of the District Court be reversed with directions to vacate the order to produce and the order of contempt.

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